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6 *d/b/a The Commerce Bank of Oregon*

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10 UNITED STATES BANKRUPTCY COURT  
11 DISTRICT OF OREGON

12 In re:

13 Heritage Specialty Foods, LLC,  
14 Debtor.

Case No. 23-31368-pcm11

**ZIONS BANCORPORATION, N.A. D/B/A  
THE COMMERCE BANK OF OREGON'S  
OBJECTIONS TO DEBTOR'S MOTION  
TO MODIFY PLAN PURSUANT TO  
11 U.S.C. § 1193(B)**

17 Zions Bancorporation, N.A., d/b/a The Commerce Bank of Oregon (the "**Bank**") submits  
18 the following objections (this filing, the "**Objection**") to *Debtor's Motion to Modify Plan of*  
19 *Pursuant to 11 U.S.C. § 1193(b)* [Dkt. No. 262, 263 and 265] (the "**Modification Motion**"). In  
20 support of this Objection, the Bank relies upon the *Declaration of Salvador Lopez in Support of*  
21 *Zions Bancorporation, N.A. d/b/a The Commerce Bank of Oregon's Objection to Debtor's*  
22 *Motion to Modify Plan*, filed contemporaneously herewith (the "**Lopez Dec.**") and the previously  
23 filed *Declaration of Nancy Lam in Support of Zions Bancorporation, N.A. dba The Commerce*  
24 *Bank of Oregon's Objection to Stipulated Order Approving Non-Adverse Modification to*  
25 *Confirmed Chapter 11 Plan of Reorganization* (Dkt. No. 259) (the "**Lam Dec.**") and respectfully  
26 states as follows:  
27

**BACKGROUND**

1. On June 23, 2023, Debtor filed a petition for relief under chapter 11 of the Bankruptcy Code in the Bankruptcy Court for the District of Oregon (the “**Court**”).

2. The Debtor filed its First Amended Plan of Reorganization For Small Business Under Chapter 11 (November 27, 2023) [Dkt. No. 202] (the “**Plan**”) on November 27, 2023.

3. On November 30, 2023, the Court entered an order confirming the Debtor’s First Amended Plan of Reorganization dated November 27, 2023 under 11 U.S.C. § 1191(a). [Dkt. No. 215] (the “**Confirmation Order**”).

4. The Effective Date of the Plan, as defined at Article 8.2, is “the first business day following the date that is fourteen days after the Bankruptcy Court’s entry of Confirmation Order.” That date is December 14, 2023.

5. Under Article 7.1 of the Plan, on the Effective Date, “all property of the bankruptcy estate [vested] in the Debtor pursuant to 1186(b) of the [Bankruptcy] Code” and the Debtor began using, disposing of and otherwise dealing with its property and conducting its affairs without supervision of the Court and free of any restrictions imposed by the Bankruptcy Code, but subject to any restrictions expressly imposed by the Plan or the Confirmation Order.

6. The Debtor has made certain distributions required under the Plan to the Bank since the Effective Date. (Lam Dec., ¶3).

7. Pursuant to the Order Awarding Final Compensation and Reimbursement to Professionals entered by this Court on February 12, 2024, Debtor’s counsel and its financial consultant were allowed fees of over \$480,000, with over \$160,000 of that authorized to be paid by the Debtor post-confirmation after application of remaining retainers. (Dkt. No. 242). It is likely that those payments on these administrative expenses were made because the Plan provides that the holders of those administrative expense claims “will be paid in full on the Effective Date, in cash, or upon such terms as may be mutually agreed upon by the Debtor and the holder of such claim.” (Plan, §3.2). The professionals surely applied their remaining retainers of over \$324,000 and there is no evidence in the record that they did not also receive

1 the cash payments of over \$160,000.

2 8. The Plan called for Loan Modifications for the Class 1 and 2 claims of the Bank  
3 and a new Promissory Note for Class 3 (“the “**Loan Documents**”). (Lopez Dec., ¶2). In mid to  
4 late February of 2024, the Bank and the Debtor reached agreement and the Debtor executed loan  
5 documents as called for under the Plan. *Id. Id.* It took a fair amount of time for the parties to  
6 work out the details of the Loan Documents, but all three documents were executed by the Bank  
7 shortly after the Bank received the signed versions from the Debtor. *Id.* Through inadvertence,  
8 the copies signed by the Bank were not delivered to the debtor until after the Debtor filed the  
9 Modification Motion. *Id.*

10 9. On March 19, 2024, the Debtor requested an \$80,000 advance on the line of  
11 credit. In response, Mr. Lopez had explained to the Debtor that it would take some time to  
12 onboard the Loan Documents into the Bank’s system. (Lopez Dec., ¶3). The Debtor stated that  
13 it understood that and agreed to be patient. *Id.* After that, the Debtor did not make any other  
14 requests for an advance.

15 10. The Debtor provides borrowing base certificates (“**BBCs**”) to the Bank. (Lopez  
16 Dec., ¶4). While early post-confirmation the BBCs indicated that there was a positive borrowing  
17 base, all the BBCs from the week ending April 15, 2024 demonstrate a deficit in the borrowing  
18 base on the Class 1 line of credit. *Id.* True and correct copies of the BBCs provided by the  
19 Debtor to the Bank from the week ending April 15, 2024 to date are attached hereto as Exhibit A  
20 to the Lopez Dec. *Id.* The BBCs in Exhibit A show deficits in the borrowing base ranging from  
21 \$73,220 to \$429,504.41 (the most recent dated June 2, 2024).

## 22 **OBJECTION**

23 Under 11 U.S.C. § 1193(b) of the Bankruptcy Code, a subchapter V plan that has been  
24 confirmed consensually under § 1191(a) cannot be modified after confirmation and substantial  
25 consummation of the plan. Here, confirmation has clearly occurred because this Court entered  
26 the Confirmation Order. And it was entered under § 1191(a) as a consensual plan. In other  
27 words, all impaired creditors consented to confirmation of the Plan – a plan pursuant to which

1 the Bank was to receive payment on its Class 1 claim in full on or before June 30, 2024.

2 Substantial consummation is defined under 11 U.S.C. §1101(2) as comprised of three  
3 parts: (1) transfer of all or substantially all of the property proposed by the plan to be  
4 transferred; (2) assumption by the debtor of the business or management of all or substantially all  
5 of the property dealt with by the plan; and (3) commencement of distributions under the plan.

6 In this case, all three conditions for substantial consummation have occurred.

7 First, under Article 7.1 of the Plan, all property of the bankruptcy estate was transferred  
8 and vested in the Debtor on the Effective Date.

9 Second, the Debtor has been managing its business and all the property dealt with by the  
10 Plan since the Effective Date. See Plan, Article 7.1. The fact that the Debtor has been managing  
11 its business and all the property dealt with by the Plan since the Effective Date is further  
12 demonstrated by the BBCs completed by the Debtor and submitted to the Bank, showing that the  
13 Debtor has been making its products, selling them and creating accounts receivable. (Lopez  
14 Dec., Exh. A).

15 Third, the Debtor has commenced making distributions under the Plan, as demonstrated  
16 by the distributions made by the Debtor to the Bank on account of the Bank's claims under the  
17 Plan. (Lam Dec., ¶3). Further, it appears that the Debtor has made distributions in the form of  
18 retainer applications for approved fees of over \$324,000 to its professionals and there is no  
19 evidence that the cash payments of over \$160,000 to the professionals were not made.

20 "Commencement of distributions under the plan" under §1101(2) occurs when the first  
21 distribution under the plan is made. COLLIER ON BANKRUPTCY (16<sup>TH</sup> ED.), ¶1193.03 (*citing, In re*  
22 *National Tractor Parts, Inc.*, 640 BR 916, 922 (Bankr. N.D. Ill. 2022) (a subchapter V case  
23 holding that the third requirement for substantial confirmation occurs "once any payment to any  
24 creditor is made"); *see also, In re Antiquities of Nevada, Inc.*, 173 BR 926, 929-930 (9<sup>th</sup> Cir.  
25 BAP 1994) (holding that third component of substantial confirmation requires "only  
26 commencement" of distributions to creditors (*quoting In re Hayball Trucking, Inc.*, 67 BR 681  
27 (Bankr. E.D. Mich. 1986))).

1           Given that the Debtor's Plan has been substantially consummated, the Plan cannot be  
2 modified. 11 U.S.C. 1193(b) (stating that the plan would have to be confirmed "as modified  
3 under section 1191(a)"). A previously confirmed subchapter V consensual plan cannot be  
4 modified unless the modified plan is once again confirmed under §1191(a) as consensual.<sup>1</sup> The  
5 Bank objects to the Modified Plan because it extends the deadline for payment on the Bank's  
6 Class 1 Claim for 18 months (from June 30, 2024 to December 31, 2025). Therefore, because  
7 the Bank, as an impaired creditor, objects to the Modification Motion, the Modified Plan cannot  
8 meet the requirements of 11 USC 1191(a) as a consensual plan and, thus, cannot be confirmed  
9 under 1193(b).

10           The Debtor appears to contend alleged actions or lack of action by a creditor authorizes a  
11 Debtor to modify a previously confirmed consensual plan. The Debtor cites no authority to  
12 support that position; nor can it because none exists. Regardless, to correct the record in this  
13 case, the Bank submits the Lopez Dec. which establishes that: (1) the Bank signed the Loan  
14 Documents (as that term is defined in the Lopez Dec.) shortly after receiving the Debtor's  
15 signatures on them; (2) the Bank inadvertently failed to provide the Loan Documents  
16 countersigned by the Bank to the Debtor, but has since provided the Debtor with those  
17 signatures; (4) the Bank informed the Debtor in response to a request for an advance in late  
18 March of 2024 that it would take some time to onboard the Loan Documents and the Debtor said  
19 it understood that and would be patient; and (5) beginning in April 2024, the Debtor's BBCs  
20 have demonstrated that the Bank's borrowing base has decreased in value with a deficit in the  
21 latest report dated June 2, 2024 of \$429,504.41. (Lopez Dec., ¶¶ 2-4; Exh. A, p. 8). Even if  
22 there was authority allowing a Debtor to modify a previously confirmed consensual subchapter  
23 V plan for alleged actions of a given creditor, there are no factual grounds to support any alleged  
24 wrongdoing by the Bank in this case.

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26 <sup>1</sup> Modification of a subchapter V plan provides creditors and other interested parties with the  
27 opportunity to object under Fed. R. Bankr. Pro. 3019(c) (incorporating requirements of 3019(b)  
and the opportunity to reject the plan as modified under §1193(d) within the time fixed by the  
court).

WHEREFORE, the Bank respectfully requests that the Court deny the Modification Motion for the reasons set forth herein and grant any other relief as is appropriate under the circumstances.

DATED this 5th day of June, 2024.

**FOSTER GARVEY P.C.**

/s/ Tara J. Schleicher

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*d/b/a The Commerce Bank of Oregon*

**CERTIFICATE OF SERVICE**

I hereby certify that on this date, I caused to be served the foregoing **ZIONS BANCORPORATION, N.A. D/B/A ZIONS BANCORPORATION, N.A. D/B/A THE COMMERCE BANK OF OREGON'S OBJECTIONS TO DEBTOR'S MOTION TO MODIFY PLAN PURSUANT TO 11 U.S.C. § 1193(B)** upon the following counsel of record:

- NATHAN ROBERT BENDER  
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And by the following indicated method on the date set forth below:



**CM/ECF system transmission.**

DATED this 5th day of June, 2024.

*/s/ Tara J. Schleicher*

Tara J. Schleicher